

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 16, 2012

v

JOHNATHAN DARTRELL MCCLAIN,

Defendant-Appellant.

No. 301040
Genesee Circuit Court
LC No. 09-026145-FC

Before: SERVITTO, P.J., and TALBOT and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree murder, MCL 750.316, assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a third habitual offender, MCL 769.11, to life in prison for the first-degree murder conviction, 285 months to 40 years for the assault with intent to commit murder conviction, two years for the felony-firearm conviction, and 24 to 60 months for the felon in possession conviction. We affirm.

I. BASIC FACTS

This case arises from a shooting that occurred on Witherbee Street in the city of Flint during a drug deal. Corey James and Jakquos Hightower were good friends. Hightower made his living selling marijuana. On occasion, James would also sell marijuana. At approximately 2:00 p.m., on September 28, 2009, the two men were driving in the area of Witherbee Street, an area located in the north side of Flint, to sell a quarter pound of marijuana. Hightower was driving and James was in the front passenger's seat. Hightower parked the vehicle on Witherbee Street, facing west toward Dupont Street. An individual entered the back of the vehicle on the driver's side. James turned around when the back passenger side door opened and saw the individual as he entered the vehicle. James described the individual as a light-skinned African-American male that weighed between 130 and 140 pounds, and appeared to be about 5'5" tall. The individual was wearing a black hoodie and a black hat. James stated that he was able to clearly see the individual's whole face and indicated that something about the individual's eyes captured his attention. James identified the individual as defendant.

After entering the vehicle, defendant asked for marijuana. Defendant also requested Hightower to move the vehicle a couple houses down because he indicated that there were two

“nosey” girls outside. After moving the vehicle a couple houses down, Hightower handed defendant two sandwich baggies of marijuana. Defendant asked Hightower if he had a scale and Hightower responded that it had been previously weighed. James heard defendant say, “[T]his s*** mine [sic],” and then heard what he described as the clicking sound that a gun makes when the safety is turned off. James turned around and saw defendant with a chrome and black automatic handgun in his right hand. Hightower and defendant proceeded to tussle over the handgun. James pushed the gun back as it was pointed at his head. The handgun fired, hitting James’s left arm. The gun fired again hitting James’s left side under his heart. James was able to open the car door and flee from the vehicle. James indicated that the incident in the vehicle occurred in less than 40 seconds. Hightower had been shot and later died as a result of his injuries.

At the hospital, James provided police officers a physical description of the shooter and a general description of how the shooting occurred. James told the officers that he did not know the shooter and failed to inform the police that he had seen defendant approximately one month prior to the shooting.

After leaving the hospital, a couple of individuals that James knew from the “streets” provided James with the shooter’s name. With this information, James went to the Michigan Department of Corrections Offender Tracking System (“OTIS”) website and confirmed that the individual pictured under that name was the shooter. Defendant’s appearance was slightly different on OTIS; defendant’s head was shaved in the OTIS photograph, and when James saw defendant during the shooting, he was unable to see defendant’s hair style because defendant wore a hat and hoodie. James testified that he was absolutely certain that the man in the OTIS photograph was the shooter.

At trial, two inmates that met defendant while defendant was incarcerated at the Genesee County Jail testified regarding admissions defendant made concerning his role in the shooting. Other witnesses from the neighborhood where the incident occurred placed defendant in or near the car at the time of the shooting.

Defendant was convicted and sentenced as outlined above. He now appeals as of right. We denied defendant’s motion to remand for a *Ginther*¹ hearing for “failure to persuade the Court of the necessity of a remand at this time.” *People v McClain*, unpublished order of the Court of Appeals, entered June 13, 2011 (Docket No. 301040).

II. DEFENDANT’S STATUS AS PAROLEE AND HIS PHOTOGRAPH ON OTIS

At trial, testimony regarding defendant’s photograph on OTIS was frequently elicited. Testimony regarding defendant’s status as a parolee was also admitted at trial. Defendant’s previous parole officer testified that defendant was on his caseload and had been convicted of “unauthorized driving of an automobile and attempted carrying a concealed weapon.” Defendant argues that this information was irrelevant and deprived defendant of a fair trial. We disagree.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Due to defendant's failure to object to the evidence, this Court will review the issue for plain error. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). To establish plain error, defendant must show that: (1) an error occurred; (2) the error was plain; and, (3) the plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Under MRE 402, all relevant evidence is admissible unless otherwise provided by constitution or court rule. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403). The fact that evidence is damaging does not mean it constitutes "unfair prejudice," particularly because "[a]ny relevant testimony will be damaging to some extent." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995) (quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983)). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

We find that the information regarding defendant's photograph on OTIS was relevant to explaining how James confirmed the identity of defendant as the assailant. The record shows that although James had knowledge regarding the assailant's physical description, he did not know the assailant's name when interviewed by the police. After receiving the name of the alleged assailant by several of James's friends, James was able to confirm that the name provided to him was the name of the assailant by matching the name to the photograph provided on OTIS. Further, we conclude that the probative value of the testimony was not substantially outweighed by undue prejudice. The record shows that the testimony related solely to James's use of the website to confirm that defendant was the shooter and therefore, there was little danger that the jury would give the testimony undue or preemptive weight. Accordingly, we conclude that the testimony was relevant and not unduly prejudicial.

We also find that that the testimony provided by defendant's parole officer was relevant in establishing that defendant was ineligible to carry a firearm during the shooting, which is a necessary element that must be proven to convict defendant of the offense of felon in possession of a firearm.² Defendant's general denial of guilt placed all of the elements of the charge against him at issue. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Defendant did not stipulate that he was ineligible to carry a firearm during the commission of the

² The prosecution must prove the following elements to support a conviction of felon in possession of a firearm: (1) that defendant is a convicted felon who is prohibited from possessing a firearm and (2) is in possession of a firearm. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005).

shooting. Therefore, we conclude the admission of the parole officer's testimony was highly relevant to establish that defendant was a convicted felon, and therefore, ineligible to carry a firearm. Although the information regarding defendant's prior conviction may have been prejudicial as it shed light on defendant's criminal past, we find that it was not unduly prejudicial. The testimony related strictly to defendant's status as a parolee for the conviction and did not reference any of the underlying facts that supported the conviction. Therefore, we find that the testimony admitted was relevant to issues at trial and its probative value was not substantially outweighed by its alleged prejudicial effect. Accordingly, defendant failed to establish that there was plain error in admitting the testimony regarding his photograph on OTIS and status as a previous parolee.

Further, under the plain error standard of review, to avoid forfeiture of this issue, defendant must establish that the alleged evidentiary error resulted in prejudice, which he has failed to do. The record shows that there was overwhelming evidence admitted at trial that identified defendant as the assailant. Two eyewitnesses connected defendant to the shooting. Anita Riley, a resident on Witherbee Street, identified defendant as the individual that entered the backseat of vehicle prior to the shooting and as the individual that exited the vehicle after the shooting. James identified defendant as the individual that shot him in the vehicle. Further, defendant admitted to two individuals, both of whom testified at the trial, that he shot Hightower and James. Therefore, defendant failed to establish that he was prejudiced by the admission of the alleged unduly prejudicial testimony.

III. IDENTIFICATION TESTIMONY

The trial court held a hearing on defendant's motion to suppress James' identification. After hearing the testimony, the trial court determined that there was no evidence of "any improper police conduct that resulted in any tainted identification of the Defendant by the witness Corey James." The trial court then determined that James had two brief encounters with defendant, one encounter occurred approximately seven weeks before the shooting and the other encounter occurred during the shooting. The trial court stated that although the time in the vehicle was relatively short, approximately 45 to 60 seconds, defendant and James were in close proximity. The trial court also noted that there was no discrepancy between the description given by James of the shooter and defendant. Further, James has consistently identified defendant as the shooter and there is no evidence to suggest that James was suffering from any physical or mental disability that would have prevented him from identifying the shooter. Therefore, the trial court concluded that the prosecution established by clear and convincing evidence that there was a sufficient independent basis for James to identify defendant as the shooter from the observations he made while in the vehicle. Accordingly, the trial court denied defendant's motion to suppress the identification testimony.

Defendant argues that the trial court erred in allowing James to identify defendant at trial because there was no independent basis for an in-court identification when James only identified defendant as the assailant after viewing defendant's photograph on OTIS 20 to 30 times. We disagree. In reviewing a trial court's decision to admit identification evidence, this Court will not disturb that decision unless it was clearly erroneous. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.*

A defendant's right to due process of law is violated when a pretrial identification procedure is employed that is so suggestive in light of the totality of the circumstances that there is a substantial likelihood that it resulted in a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The defendant bears the burden to establish that the pretrial identification procedure employed was impermissibly suggestive. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). If the trial court finds that the pretrial identification procedure was impermissibly suggestive, testimony concerning the identification is inadmissible unless it is established that there is an independent basis for the witness' in-court identification "that is untainted by the suggestive pretrial procedure." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

To admit identification evidence, the trial court is required to make a factual determination regarding whether there is an independent basis for the in-court identification. *Gray*, 457 Mich at 115. In making such a determination, the trial court reviews the following factors: (1) the witness's prior relationship with or knowledge of the defendant; (2) the witness's opportunity to observe the offense, which takes into consideration the length of time of the observation, proximity to the criminal act, and sensory perception factors that affect the observation; (3) the length of time between the identification and the offense; (4) any failure by the witness to previously identify the defendant as the assailant; (5) any identification by the witness of another individual as the assailant; (6) the accuracy between the description given and the defendant's actual appearance; (7) the physical and mental state of the witness while making the observation; and, (8) whether there are any idiosyncratic or special features of the defendant. *Gray*, 457 Mich at 115-116.

The record shows that after James provided the police with defendant's name, the police pulled six photographs, including defendant's photograph, and placed them in front of James for identification. Within seconds, James identified defendant as the shooter. Defendant does not argue, nor was there evidence presented at the suppression hearing, that the photographic line-up was unduly suggestive. Defendant argues that the pretrial procedure was tainted by the fact that James looked at defendant's photograph more than 20 times prior to identifying defendant as the shooter. Even if this conduct tainted the pretrial photographic line-up, we conclude that the trial court did not err in concluding that there was an independent basis to allow for James's in-court identification of defendant. In analyzing whether there is an independent basis for the in-court identification, great emphasis is placed on the witness's opportunity to observe the offense and whether the witness previously made a proper identification or failed to identify the defendant. *Gray*, 457 Mich at 116-117. Here, although the interaction between defendant and James lasted for a relatively short time period, defendant and James were in close proximity, thus allowing James to observe the physical appearance and characteristics of defendant. James testified that he was able to clearly see all of defendant's facial features. Further, the record shows that James did not suffer from any mental or physical disabilities that would have prevented him from making accurate observations. James also indicated that he recognized defendant from a brief encounter that occurred several weeks before the shooting. Additionally, the record shows James consistently identified defendant as the shooter. Accordingly, we conclude that the trial court did not err in admitting the identification evidence.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that counsel was ineffective when he failed to object to the testimony regarding defendant's previous status as a parolee and testimony regarding defendant's photograph on the OTIS website. We disagree. Although defendant moved to remand the case to the trial court for a *Ginther* hearing, we denied the request. As such, our review is confined "to errors apparent on the record." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

An ineffective assistance of counsel claim "is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.* at 579. To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness; (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and, (3) the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions to decline to object to procedures, evidence or an argument may fall within sound trial strategy. *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008). Defense counsel is afforded wide latitude on matters of trial strategy and this Court abstains from reviewing such decisions with the benefit of hindsight. *Id.* at 242-243.

We have concluded that references to defendant's photograph on OTIS as well as his status as a parolee were admissible. Defense counsel was not ineffective for failing to make futile objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Nevertheless, defense counsel was not ineffective for failing to object to testimony regarding defendant's photograph on OTIS. It appears from the record that defense counsel attempted to undermine James's identification of defendant by pointing out that the identification was unreliable. Defense counsel sought to illustrate this by underscoring that James's identification was based on viewing the OTIS photograph, and therefore, it was not based on James's own perception.

Defense counsel presented his strategy when making his opening statement, stating, "what's important in this case is whether or not this identification is based on what [James] saw on September 28th or [from the] image that was burned into his head from looking at this picture 20 times on the internet." Given that the trial court denied defendant's motion to suppress James's in-court identification of defendant, we believe that defense counsel prudently decided to undermine the weight of James's in-court identification by illustrating the unreliability of the identification. Therefore, an objection to testimony regarding James's viewing of defendant's photograph on OTIS would have conflicted with defense counsel's strategy to use the OTIS viewing to weaken James's in-court identification of defendant. Accordingly, we defer to defense counsel's decision not to object to testimony regarding defendant's photograph on OTIS as a matter of sound trial strategy.

In regard to defendant's argument that defense counsel should have objected to testimony regarding defendant's prior status as a parolee, defense counsel may have taken into considerations several factors when deciding to abstain from objecting, including whether an

objection would draw unnecessary attention to defendant's previous convictions. Even if defense counsel's decision fell below an objective standard of reasonableness, defendant failed to establish that the outcome of the proceeding would have been different absent the error. As discussed above, evidence of defendant's guilt was overwhelming. Accordingly, defendant failed to establish that he was deprived of his right to the effective assistance of counsel.

V. JURY INSTRUCTIONS

Defendant next argues that the trial court erred in denying his request for an instruction on voluntary manslaughter. We disagree. While reviewing jury instructions that involve questions of law de novo, this Court reviews a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

"Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also 'inferior' offenses within the scope of MCL § 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). To prove voluntary manslaughter, the prosecution must prove that: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) a lapse in time had not passed where a reasonable person could have controlled his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). The element of provocation distinguishes the offense of voluntary manslaughter from murder. *Id.* To mitigate a killing from murder to voluntary manslaughter, the necessary degree of provocation required "is that which causes the defendant to act out of passion rather than reason." *Id.* "If the evidence presented could not support a conviction of the lesser offense, then the judge should not give the requested instruction." *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

We agree with the trial court's conclusion that there was no evidence on the record for a reasonable jury to find that defendant acted out of passion or anger that was brought about by adequate provocation. To establish adequate provocation, circumstances must exist "which would cause a *reasonable person* to lose control." *Sullivan*, 231 Mich App at 518. Here, no circumstances existed to cause defendant to lose control and then shoot Hightower and James. The record shows that after defendant declared that the marijuana belonged to him, defendant pulled out a handgun and a struggle over the weapon ensued. There is no indication that either passenger, Hightower or James, engaged in any actions that would have provoked defendant to act out of passion rather than reason. Therefore, we conclude that the trial court did not abuse its discretion when it concluded that an instruction on voluntary manslaughter did not apply to the facts of the present case. Accordingly, the trial court did not err in denying defendant's request for such an instruction.

VI. SCORING OF OV 9

Defendant asserts that, since there was only one victim for the assault with intent to commit murder conviction, his score for OV 9 should be scored at zero instead of 10. We disagree.³ While reviewing the application of the sentencing guidelines de novo, this Court reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Harverson*, 291 Mich App 171, 179; 804 NW2d 757 (2010). A scoring decision will be upheld if there is any evidence to support such a decision. *Id.*

Offense Variable 9 pertains to the number of victims associated with the scoring offense. *People v Mann*, 287 Mich App 283, 285; 786 NW2d 876 (2010). In scoring OV 9, a court is to count each person who was placed in danger of physical injury or loss of life or property during the transaction giving rise to the particular offense as a victim. *Harverson*, 291 Mich App at 181. MCL 777.39, which governs the scoring of OV 9, provides in relevant part, that the trial court must assess 10 points if two to nine victims were placed in danger of physical injury or death. Here, the record shows that two victims, Hightower and James, were in close proximity to defendant in the vehicle when defendant shot James. Clearly, defendant placed two victims in danger of physical injury or death when he shot at James in the vehicle, and therefore, appropriately scored OV 9 at 10 points. Accordingly we conclude that the trial court did not abuse its discretion in scoring 10 points for OV 9.

VII. MOTION FOR MISTRIAL

Before the jury delivered its verdict, the trial court indicated that, "a couple of jurors were concerned about the Defendant's access to the questionnaires that were brought to the Courtroom during jury selection and whether what was made available exactly, whether any access was had by the Defendant." Defendant moved for a mistrial, arguing that that the jurors formed an opinion that defendant was a dangerous person. The trial court disagreed, concluding that the jurors' question related to their privacy concerns and that it was normal for jurors to wonder how their information was disseminated.

Defendant argues that he is entitled to a new trial. We disagree. This Court reviews a trial court's decision to grant or deny a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Jurors are presumed to be impartial and the burden rests "on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008).

We find that the jurors' expressed concerns do not establish that they formed an opinion that defendant was a dangerous person and guilty of the charged offenses prior to deliberations. Contrary to defendant's argument, there is nothing in the record to indicate that the jury

³ Given defendant's failure to provide his Presentence Investigation Report, we would be within our right to decline to consider defendant's claim. MCL 769.34(8)(b); MCR 7.212(C)(7). However, the record shows that defendant objected to the scoring of OV 9 at sentencing and otherwise raised the issue for the trial court's consideration. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10).

expressed feelings of fear. We agree with the trial court that the inquiry related to the jurors concern for privacy. Therefore, defendant failed to establish that the jurors were not impartial and that he was deprived of his right to an impartial jury. Accordingly, we conclude that trial court did not abuse its discretion in denying defendant's motion for a mistrial on those grounds.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly